



December 22, 2000

Mr. Bion M. Gregory
Legislative Counsel
State Capitol, Room 3021, B-30
Sacramento, CA 95814

Dear Mr. Gregory:

In compliance with Public Contract Code Section 12129, the Department of General Services (DGS) has posted its Alternative Protest Pilot Project report on its Internet site. The site address is <http://www.legi.dgs.ca.gov/>.

If you have any questions, require additional information or copies of the report, please contact Dennis Ericson, Acting Deputy Director, Procurement Division, at (916) 445-6942.

Very truly yours,

BARRY D. KEENE, Director
Department of General Services

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ALTERNATIVE PROTEST PILOT PROJECT

July 31, 2000

BACKGROUND

Under provisions of the Public Contract Code (PCC) for traditional processes, any unsuccessful bidder may appeal or protest the proposed award of a contract for the acquisition of goods or information technology (IT). If the issues cannot be resolved between the state agency and the unsuccessful bidder, the State Board of Control (SBOC) decides the protest. Under this process, the contract cannot be awarded until the protest is resolved. This can prove to be an expensive and time-consuming process and often delays the progress of many state programs.

In recent years, much attention has been focused on the IT acquisitions, including the protest resolution process. Under Chapter 762, Statutes of 1997 (AB 1159 - Bowen), an "Alternative Protest Pilot Project" was established to address some of the recommendations made by then-Governor Wilson's Task Force on Government Technology Policy and Procurement in their 1994 report. The terms of the pilot project are set forth in the PCC Sections 12125-12130. Regulations implementing the pilot are in the California Code of Regulations (CCR), Title 1, Sections 1400-1440.

REQUIREMENTS

PILOT REQUIREMENTS

The regulations governing the protest pilot project were established using the process required by the Administrative Procedure Act. Table 1, "Comparison of Processes," contrasts the requirements of the protest pilot and the traditional processes.

Table 1, Comparison of Processes

Alternative Protest Pilot Project	Traditional
An official Protest Coordinator within the Department of General Services (DGS) is established in regulation to facilitate the overall protest process, and to ensure quality and consistency.	No coordinator is required.
The DGS Office of Administrative Hearings (OAH), using a changing pool of ten state and private Administrative Law Judges (ALJ), administers the arbitration process used to resolve protests.	Administrative hearings before a Hearing Officer selected by the SBOC.
The DGS Protest Coordinator is authorized to determine a protest is frivolous. If the protesting bidder still wishes their protest to be heard by an ALJ, they must post a bond.	The DGS has no authority to determine that a protest is frivolous. No bonds are required.
Resolution is required within 45 calendar days after a protest is filed. However, the ALJ may extend this by 15 calendar days if necessary.	No mandated time limitations on the SBOC protest resolution process.
A filing fee and deposit are required from each protesting bidder. California certified small businesses are exempt from submitting a deposit, but responsible for arbitration costs if the protest is denied.	No filing fee or deposit is required from any party.
The losing party pays the OAH arbitration costs. The state and the protesting bidder share costs when the OAH does not uphold the Coordinator's determination that a protest is frivolous, but does deny the protest.	All costs are absorbed by the state.
Sanctions may be imposed as provided for in statute and regulation.	The statute does not provide for sanctions.
A contract may be awarded before the protest is resolved.	The state cannot enter into a contract until the protest is resolved.

Other requirements of the pilot:

- A. Major IT acquisitions included in the pilot must meet the following criteria:
 - 1. The solicitation must reflect the state agency's business needs instead of detailed specifications; and
 - 2. The solicitation must reflect the state agency's criteria for award, including the weighting to be used in evaluating each criterion; and
 - 3. The contract shall be awarded based on a value-effective solicitation (as defined in the PCC Section 12100.7), a competitive negotiation, an alternative procurement, or a performance-based solicitation.
- B. The pilot project shall continue until:
 - 1. It has been applied to 25 contracts, at least ten of which are IT; or
 - 2. Until December 31, 1999, whichever occurs later.
- C. The state may also conduct solicitations for goods based on a value-effective solicitation (sometimes called "best value"), a competitive negotiation, an alternative procurement, a performance-based solicitation, or other methodologies established by the DGS.

REPORT REQUIREMENTS

This report was prepared pursuant to the specific requirements of the PCC Section 12129. It includes information from all pilot solicitations, as well as solicitations conducted for goods and the IT under existing procedures (traditional process) during the twenty-seven months from March 1, 1998, (the date the regulations became effective), through June 30, 2000. The specific requirements of each subparagraph are noted below.

PCC § 12129(a) requires the DGS to report “*the percentage of bids with values under five hundred thousand dollars (\$500,000), under one million dollars (\$1,000,000), and over one million dollars (\$1,000,000) or more not in the pilot project that were protested with corresponding data for solicitations issued pursuant to the pilot project.*”

Table 2, “Solicitations by Award Value,” shows the breakdown of the solicitations during the report period:

Table 2, Solicitations by Award Value						
AWARD VALUE	Less Than \$500,000		\$500,000 – to Less Than \$1 Million		\$1 Million or More	
	Pilot	Traditional	Pilot	Traditional	Pilot	Traditional
Number of Solicitations Issued	836	2778	63	95	46	143
Number of Solicitations Protested	12	30	2	6	4	10
Percent of Solicitations Protested	1.44%	1.08%	3.17%	6.32%	8.70%	6.99%

PCC § 12129(b) requires the DGS to report on “*the number of protests determined to be frivolous by the Department of General Services, subject to this chapter, with corresponding data for solicitations issued pursuant to existing procedures.*”

There is no definitive method to identify frivolous protests under the traditional process.

None of the protests received under the pilot were determined to be frivolous.

PCC § 12129(c) requires the DGS to report on “*the percentage of contracts awarded under the pilot project that were subsequently challenged in a court of law with corresponding data for solicitations issued pursuant to existing procedures.*”

None of the contracts awarded under the pilot or traditional processes were subsequently challenged in a court of law during the reporting period.

PCC § 12129(d) requires the DGS to report on “all costs of a protest incurred by state agencies subject to subdivision (b) of Section 12126 from the original date filed, until final resolution. This shall include all costs associated with a successful protest and commencement of work under subdivision (b) of Section 12126 from the original date filed, until resolution, with corresponding data for solicitations issued pursuant to existing procedures.”

The costs incurred are identified in Table 3, “Protest Costs,” as follows:

- **Type I** - these represent protests that were withdrawn by the protesting bidder prior to submission of a detailed statement of protest; or the solicitation was canceled by the state, rendering the protest moot.
- **Type II** - these represent protests that were filed, the protesting bidder submitted the required written material, the state responded to the protesting bidder’s written material, and no hearing was held (either because the protesting bidder withdrew the protest after receiving the state’s written response; because the state rescinded its award notice or cancelled the solicitation; or a traditional protest was dismissed without hearing by the SBOC).
- **Type III** - protests heard by either an ALJ (pilot project protests) or the SBOC Hearing Officer (traditional protests). Since there appeared to be a significant difference in the costs, depending on whether a protest was upheld or denied, we included this breakdown as well.

Costs for all types reflect the average costs for a single protest. Calculations were based on actual protests using known staff civil service classifications and the number of staff hours.

Table 3, Protest Costs								
PROCESS	TYPE I		TYPE II		TYPE III			
					PROTEST DENIED OR WITHDRAWN		PROTEST UPHELD	
	State	Protesting Bidder	State	Protesting Bidder	State	Protesting Bidder	State	Protesting Bidder
Pilot	\$1,417	\$0	\$3,783	\$0	\$7,935	\$2,316	\$12,255	\$0
Traditional	\$2,358	\$0	\$4,070	\$0	\$7,553 +SBOC Costs	\$0	\$7,553 +SBOC Costs	\$0

In the traditional protest process, hearing costs are absorbed by the state whether protests are upheld or denied. There are no direct costs or negative consequences imposed on the protesting bidder.

In contrast, the pilot requires a protesting bidder to submit a filing fee, a deposit for estimated arbitration costs (the protesting bidder pays these costs when a protest is denied), and post a bond if the protest is deemed frivolous and the protesting bidder wishes the protest to be heard by an ALJ (the bond is forfeited to the DGS if the ALJ agrees that the protest is frivolous). California certified small businesses are not required to submit a deposit of estimated arbitration costs; however, they remain responsible for the arbitration costs if their protest is denied. Under the pilot, the state is responsible for paying the arbitration costs when a protest is upheld.

Additionally, the statute allows the imposition of sanctions that preclude eligibility from participating in pilot solicitations. Sanctions are applicable against a protesting bidder who, after July 1, 1999, files a protest that is not upheld and unsuccessfully protested a solicitation valued over \$1 million during the previous fiscal year. Sanctions are also applicable against a protesting bidder who previously withdrew or waived two frivolous protests prior to the arbitrator's decision and who files a third protest determined frivolous by the Coordinator.

PCC § 12129(e) requires the DGS to report on “*the length of time to resolve protests pursuant to this chapter and the corresponding data for solicitations issued pursuant to existing procedures.*”

While pilot protests must be resolved within forty-five (45) calendar days (the ALJs may extend 15 calendar days if necessary), there is no statutory or regulatory time limitation to resolve protests filed under the traditional process. On average, pilot protests were resolved at least **40 percent faster** for all protests and **49 percent faster** for protests that went to hearing.

Table 4, “Resolution Timeframe,” provides the length of time to resolve protests, using calendar days. The resolution timeframe is the number of days from receipt of a protest through the date of protest resolution.

Table 4, Resolution Timeframe								
LENGTH OF TIME TO RESOLVE PROTESTS	1998		1999		2000		OVERALL AVERAGE	
	Pilot	Traditional	Pilot	Traditional	Pilot	Traditional	Pilot	Traditional
Average Number of Days For All Protests (Types I, II and III)	16	48	27	22	1	31	18	31
Average Number of Days When Heard (Type III)	39	115	59	97	N/A*	69	49	97

*No pilot protests required a hearing in 2000.

CONCLUSION

The PCC Section 12130 states, *“The pilot project shall be considered a success if there is at least a 10-percent reduction in the number of frivolous protests filed with the Department of General Services and if the length of time for the state to resolve protests is reduced by at least 20 percent, or if there is a substantial reduction in the number of protests filed under the pilot project than under the existing protest procedures.”*

The first success criterion cannot be met. There is no definitive method to identify frivolous protests under the traditional process and no protests were determined to be frivolous under the pilot.

The second success criterion – the length of time for the state to resolve protests – has been met, and even exceeded. This is clearly illustrated in Table 4 with protests filed under the pilot averaging only **half the time** in which traditional protests are resolved (see “Overall Average” above).

The results are inconclusive as to whether or not the third criterion has been met. For transactions from \$500,000 to \$1 million, as noted in Table 2, there has been a substantial reduction (more than 50 percent) in the percentage of protests filed under the pilot, as compared to the number filed under the traditional process. However, for transactions less than \$500,000 and for those more than \$1 million, the percentage of protests filed under the pilot is greater than the percentage filed under the traditional process.

RECOMMENDATION

One of the requirements of the pilot is that it be applied to ten IT solicitations, and it has only been applied to three at the time of this report. Of the three included, only one solicitation was actually completed (no award was made on the other two). Therefore, it is recommended that the pilot be continued until at least ten IT solicitations are completed, and any protests lodged are resolved using the pilot procedures.